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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 282

MARGARETHA THOMPSON,

Petitioner,

vs.

FIDELITY AND CASUALTY COMPANY OF NEW YORK, a Corporation,

Respondent.

Brief In Opposition To Petition For Writ Of Certiorari.

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Preliminary.

It is assumed by Respondent that the Petition for Writ of Certiorari heretofore filed includes a supporting Brief. In any event, no separate supporting Brief has been filed within the requisite time.

Facts.

This case involves only one question: whether the Insured was a passenger on an Aircraft Operated by a Scheduled Air Carrier as defined in the insurance policy.

The owner of the aircraft in question, William Roy Robinson, testified that he and his partner-brother did business under the name of Peninsular Air Transport. They owned four airplanes and were licensed as an irregular or non-scheduled air carrier (Rec. 110; Abst. 37); that the airplane in question arrived at Boeing Field, Seattle, about November 14th and departed on November 17th (Rec. 113; Abst. 38); that Peninsular had never flown into Seattle before and that, of course, the airplane did not operate pursuant to any schedule of any kind. (Rec. 113, 116; Abst. 38-39).

The policy in question was included in one page and mentioned no less than thirteen (13) times that it insured only passengers and aircraft operated by scheduled air carriers. Such carriers were defined as those operating on a regular flight between named cities at regular and specified times.

The intermediate Appellate Court of Illinois (16 Ill. App. 2d, 159) held that, in its opinion, there was no evidence that the airplane in question was an aircraft operated by a scheduled air carrier, as defined in the policy and said (Pet. 10a):

> "There is nothing ambiguous about the term scheduled air carrier. This term has a clear and concise meaning and when defined by *any standard* it simply denotes an air carrier which operates and holds itself out to the public that it does operate aircraft between designated points regularly, or with

a reasonable degree of regularity, pursuant to a schedule previously announced. We are not unmindful of the fact that words have different meanings and different significations to different people on different occasions or under various and different circumstances, but we cannot perceive how the term scheduled air carrier can have other than one meaning; that being an air carrier which operates aircraft between designated points regularly in accordance with previously announced schedules."

The Issue.

The issue as presented to the trial and reviewing Courts of Illinois revolved around the definition of the word "scheduled". As stated in the Appellate Court opinion (Pet. 9a):

> "Plaintiff contends that the term schedule in the policy has reference to the time and gives examples, such as: 'a talk is scheduled', 'we were scheduled to leave', 'the attack was scheduled', 'the parade is scheduled'."

Respondent contends that the word "scheduled" as used in connection with carriage and transportation has a definite, generally accepted meaning: "an outline of regularly recurring events such as a train schedule".

In this connection, the reviewing Court stated (Pet. 9a):

> "We cannot agree with plaintiff's theory or argument. A prearranged time can be set for any type of airplane to take off, such as a private plane, a navy plane, an army plane or even today an aircraft to outer space or the moon. However, such prearranged time for take off does not make it a 'scheduled air carrier' within the meaning of the policy before us."

Jurisdiction.

The Petitioner claims that the United States Supreme Court should take jurisdiction of this case under United States Code, Title 28, Section 1257 (Pet. 3):

> "'Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: *** (3) *** where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'"

Respondent contends that the instant opinion is not one ordinarily reviewable by certiorari.

At the outset, it is apparent that a Federal question is neither involved nor properly presented in this case.

Petitioner's contention that there is a Federal question here apparently arises from the fact that the policy in question does refer to carriers licensed as "scheduled" and "irregular or non-scheduled" air carriers.

First, it should be pointed out that all during the trial of this case, and on review, up to the present time, Petitioner has contended that Federal regulations had nothing to do with the issue in this case. Petitioner admits this on page 23 of her petition, stating:

> "The fact that the Petitioner at the outset of this case did not base its claim on the Federal statute or that the trial court ruled in the Petitioner's favor on non-Federal grounds does not affect this Court's right to jurisdiction * * *."

This statement is not the law. Manifestly, the dictates of safe and proper practice require that any Federal question in a case be raised or drawn in question in the State Courts at the earliest possible time or stage of litigation. While it is not essential in all cases that the Federal question be made in the trial Courts, it must be asserted

in the State Courts at such a time or stage of the case that the highest Court of the State, whose decision it is sought to have reviewed, can, pursuant to the settled rules of State practice, take judicial cognizance of, and consider and pass upon, the Federal question presented.

In *Olympia Mining & Milling Co.* v. *Kerns*, 236 U. S. 211, 59 L. Ed. 542, 35 Sup. Ct. 415, the Petitioner first raised in the United States Supreme Court the question whether certain Idaho statutes of limitation were in violation of due process and the equal protection facets of the 14th Amendment. The opinion by Mr. Justice White dismissing the writ of error for want of jurisdiction stated (p. 544):

> "But without in the remotest degree admitting that these propositions afford the slightest ground for converting such a purely State question as the operation of statutes of limitations upon real property situated in a State into Federal questions giving rise to jurisdiction of this Court to review, there is obviously in any event no jurisdiction, because in no manner and at no time were the alleged Federal questions, be they real or imaginary, presented or even remotely suggested in the Court below."

The Respondent will not labor this point. It is one generally recognized and established in many cases.

In this case, Petitioner did not mention the point now raised in her instant Petition for Writ of Certiorari at any time during the trial, review to the intermediate Appellate Court, or Petition for Leave to Appeal to the Illinois Supreme Court.

Court opinion did not decide this case upon the interpretation of a Federal statute. There is no question of interpretation or applications of any Federal statute involved here.

Assuming, however, that there might be some Federal question, it is necessary not only that a Federal question

was presented for decision to the highest Court of the State, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided. In *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 2, 84 L. Ed. 536, 60 Sup. Ct. 375, the Respondent taxpayer contested the assessment of a State tax as unconstitutionally burdening foreign commerce. The matter was brought up through trial and reviewing Courts to the Court of Appeals of New York. In dismissing the writ of certiorari for want of jurisdiction, the United States Supreme Court said (p. 537):

> "In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of the tax *solely* because of violation of the Federal Constitution, we are unable to find that the decision of the highest Court of the State did not rest upon an adequate non-Federal ground."

There are a number of cases announcing the rule that in the absence of an opinion by the State Court, or where from the record it can be ascertained whether that Court's decision was based on State or Federal grounds, both of which are in the same case, and the non-Federal grounds are broad enough to sustain the judgment, the Supreme Court will not take jurisdiction. In this connection, it has been said that the facts conferring jurisdiction on the Supreme Court must appear affirmatively from the records, and that jurisdiction on the ground that a State Court rested its decision on a Federal ground cannot be founded on surmise.

Petitioner is mistaken when she states, on pages 20 and 21 of her petition, that the Illinois Court based its decision upon a Federal statute. Petitioner blithely states (p. 21):

> "The term 'scheduled' as used in the policy has *two meanings*. One a *technical meaning* created by the Federal statute, and another the layman's defini-

tion of 'scheduled', meaning pre-arranged time. The Illinois Court says there are not two meanings for the term, and that the term 'scheduled' as used in the policy and the Federal statute is not technical."

A reading of the opinion indicates that this is simply not true; that the Illinois Appellate Court opinion states definitely that the common, layman's, dictionary definition of the word "scheduled" is something more than "to leave at a prearranged time" when used in connection with airplanes, trains, or other vehicles of transportation. It means "operating a vehicle according to a schedule", which necessarily connotes an outline of regularly recurring events. The United States Supreme Court is not ordinarily called upon by certiorari to construe the definition of a word.

We will not in this Brief comment upon the various extraneous matters, such as claims of waiver and estoppel, accusations that the insurance company intended to keep the premium, and that its conduct constituted fraud. All of these points were raised on appeal and decided upon. They are essentially non-Federal in nature.

We respectfully submit that this Petition for Writ of Certiorari should be dismissed on the grounds that no Federal question is presented.

Respectfully submitted,

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